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In the Supreme Court of the United States

OCTOBER TERM, 1992

DALE R. ALBERT, JR.
PETITIONER-APPELLANT

V.

JOHN P. WHITLEY, WARDEN
LOUISIANA STATE PENITENTIARY
RESPONDENT-APPELLEE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the erroneous jury instruction which required the jury to presume specific intent based upon the circumstances or transaction which violated *Sandstrum v. Montana*, 442 U.S. 510 (1979) and *Yates v. Evatt*, 111 S.Ct. 1884 (1991), constituted harmless error.

2. Whether the State withheld from defendant prospective testimony of a witness in violation of *Brady v. Maryland*, 373 U.S. 647 (1963), and whether said error was prejudicial enough to constitute reversible error.

PARTIES INVOLVED

1. Dale R. Albert, Jr., petitioner/appellant

2. John P. Whitley, Warden Louisiana State Penitentiary, respondent-appellee

3. Douglas Greenburg, District Attorney for the 32nd Judicial District Court, Parish of Terrebonne, State of Louisiana

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ABBREVIATIONS AND RECORD REFERENCES

The following abbreviations are noted:

"ALBERT"	Petitioner-Appellant, Dale R. Albert, Jr.
"BARKER"	David Barker not called to testify, friend of Albert who met Albert at Sheraton Lounge
"BREAUX"	Gary Breaux not called to testify, friend of Albert who drove to bank to cash payroll check
"BURKE"	Thomas Burke called to testify for state, friend of the victim, Tharpe
"AUCOIN"	Dena Aucoin called to testify for state, Albert's girlfriend

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"FOLSE"	Debbie Folse called to testify for state
"HARMAN"	Debra Harman not called to testify for state, person who gave police report the night of shooting, also gave Albert affidavit
"LEBLANC"	Anthony LeBlanc called to testify for state
"MARTIN"	Sheila Martin (barmaid) called to testify for state
"THARPE"	Thomas Tharpe (victim in shooting)
"VERDIN"	Bruce Verdin (bartender) called to testify for state
"DR. WARREN"	Sidney Warren, Jr., M.D. (Coroner) called to testify for state
WILLIAMS"	Linda Williams called to testify for state

Record References

Trial Transcript Citation (State Record) . . SR 4/1354 (e.g)
Citations to the record are to the name of the witness (if applicable) and to the volume of the state record followed by the page number of that volume

"MNT" . . . . . Motion for New Trial Transcript

"EHT" . . . . . Evidentiary Hearing Transcript

PREVIOUS OPINIONS IN THE INSTANT CASE

1. *State v. Albert* 414 So. 2nd 680 (La. 1982)

2. *Dale R. Albert, Jr. v. John P. Whitley,* Warden, Louisiana State Penitentiary, docket number 90-3072, Section K, United States District Court, Eastern District of Louisiana (unpublished report).

3. *Dale R. Albert, Jr. v. John P. Whitley,* Warden, Louisiana State Penitentiary, docket number 91-3484, Summary Calendar, United States Court of Appeals for the Fifth Circuit (unpublished report).

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 USC Section 1254 (1) which provides

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Defendant was convicted of second degree murder pursuant to Louisiana Revised Statute 14:30.1 on or about July 1, 1980. Defendant exhausted state appeal remedies with a copy of the Louisiana Supreme Court opinion attached as Appendix "A". A petition for Habeas Corpus application was denied by the United States District Court, Eastern District of Louisiana, a copy of which decision is attached as Appendix "B", the defendant applied for an appeal to the United States Court of Appeal for the Fifth Circuit, which appeal was denied by Judgment rendered

and filed on July 9, 1992, a copy of which is attached hereto as Appendix "C". Defendant timely applied for a re-hearing of said denial to the United States Court of Appeal for the Fifth Circuit, which said application for re-hearing was denied on August 11, 1992, a copy of said denial being attached hereto as Appendix "D". Counsel for defendant timely applied for an extension of time within which to file a petition for certiorari which was granted by this Honorable Court on October 29, 1992, extending the deadline for filing a petition for a writ of certiorari to and including January 8, 1993, a copy of which is attached hereto as Appendix "E".

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana Revised Statute 14:30.1 provided at the

time of the alleged offense as follows:

Second degree murder is the killing of a human being;

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence.

Louisiana Revised Statute 14:10 provided as follows:

Criminal intent may be specific or general:

(1) Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act.

(2) General criminal intent is present whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act.

STATEMENT OF CASE

1. Course of Proceedings and Disposition in the Court

Below:

Dale R. Albert, Jr., (Petitioner-Appellant) was convicted by a twelve person jury which found him guilty of the lesser included offense of second degree murder on July 1, 1980, in violation of LSA-R.S. 14:30.1. Subsequent to a hearing on an application for New Trial, pursuant to La. C.Cr.P. Art. 851, held on August 25, 1980, he was sentenced to serve life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence.

Appellant then appealed to the Louisiana Supreme Court, Supreme Court of Louisiana, No. 81-KA-0279, State of *Louisiana v. Dale R. Albert, Jr.*, cites as *State v. Albert*, 414 So.2d 680 (1982). Conviction and sentence was affirmed on May 17, 1982, rehearing denied on June 18, 1982.

As a result of the Louisiana Supreme Court's denial of relief, Albert sought writs before the 32nd Judicial District Court, Parish of Terrebonne, on January 9 and 10, 1985, seeking a writ of habeas corpus. The 32nd Judicial District court conducted an evidentiary hearing on matters brought before this Honorable Court. As a result of a denial of relief as to a writ application, Albert then filed for relief before the Louisiana Supreme Court. On November 8, 1985, Albert received notice from the Louisiana Supreme Court, that the writ of habeas corpus was denied, State of Louisiana ex rel, *Dale R. Albert, Jr. v. Frank Blackburn, Warden*, No. 85-KH-0702. Albert then filed an application for reconsideration of the writ denial on November 11, 1985 which was also denied December 2, 1985.

28 U.S.C. 2254, provides in pertinent part as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an applica-

tion for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

Albert then filed an application for a writ of habeas corpus in the United States District Court, Eastern District of Louisiana, *Dale R. Albert, Jr. v. John P. Whitley, Warden*, No. 90-3072 K(3), which was denied on May 6, 1991. Albert then submitted an application for certificate of probable cause which was granted on June 8, 1991, by the Eastern District Court.

Albert then appealed the decision of the United States District Court, Eastern District of Louisiana, to the United States Court of Appeals for the Fifth Circuit. Pursuant to the opinion rendered and filed on July 9, 1992, the United States Court of Appeal for the Fifth Circuit, denied Albert's appeal. Albert timely applied for a re-hearing of said denial to the United States Court of Appeal for the Fifth Circuit, which said application for re-hearing was denied on August 11, 1992.

Albert now petitions this court for a Writ of Certiorari.

2. Statement of Relevant facts

At approximately six o'clock pm, Friday, December 21, 1979, a shooting occurred at the Hi-Lo Lounge located on Highway 20 in Terrebonne Parish. As a result of the shooting, Thomas Tharpe, age 26, died, and Thomas Burke, age 27, was injured losing a portion of his finger. Albert's version of the events of that day leading up to the time of the shooting and shortly thereafter are supposed by the record.

Albert wished to bring the events of December 21, 1979, to light by a step-by-step scenario.

When Albert arrived the Hi-Lo Lounge at approximately 12.30 pm that afternoon (Martin 5/1084) (Martin 5/1096) of Friday, December 21, 1979, he arrived on his motorcycle alone, as testified to by Martin and (Albert 5/1237-38). Dena Aucoin, Albert's girlfriend was not in the company of Albert when she arrived at the Hi-Lo Lounge. Aucoin arrived at the Hi-Lo Lounge at 3:00 pm (Aucoin 5/1128).

At approximately 2:00 pm, before Aucoin's arrival, a friend of Albert, a Mr. Gary Breaux, arrived at the lounge and asked Albert if he would accompany Breaux to a bank where he needed to cash his payroll check. Albert informed Breaux that the banks close at 3:00 pm and shortly before the bank's 3:00 pm closing time, Albert, while in the company of Gary Breaux, Aubrey Pete, and Ronnie Adams, left the Hi-Lo Lounge in Mr. Breaux's car and went to a bank in Thibodaux in order to cash the payroll check of Breaux (Albert 5/1238-39) (Albert 6/1291). After Breaux cashed his payroll check, Albert, while in the company of Gary Breaux, Aubrey Pete, and Ronnie Adams, went to the

Sheraton Lounge located across the street from this bank in Thibodaux at approximately 3:00 pm.

Upon arrival at the Sheraton Lounge, Albert and these three persons were greeted by a Mr. David Barker (Albert 5/1240) (Albert 6/1292), where all five persons were seated at a table together until dark, until Albert, Breaux, Pete, and Adams departed Mr. Barker and the Sheraton Lounge on their way back to the Hi-Lo Lounge shortly before 6:00 pm (Albert 5/1241) (Albert 6/1293). At no time was Albert ever in the company of Dena Aucoin during this time period (see affidavit of Mr. David Barker filed with the application for probable cause before the Eastern District Court, 5th Cir. record number 00021).

During the trial, a state witness, Thomas Burke, testified that he and Thomas Tharpe arrived at the Hi-Lo Lounge after work about 6:00 to 6:10 that afternoon (Burke 4/943). This testimony is in conflict with a certain astrological event that occurred on that particular day. On December 21, 1979, which is known as Winter Soltice, making this day the shortest day of the year, that according to the Department of the Navy, U.S. Naval Observatory, sunset in the Thibodaux, Louisiana area was at 5:08 pm Central Standard Time. Albert, pursuant to Federal Rules of Evidence, Rule 201 (d)(f), requests this Honorable Court to take judicial notice of the document attached to this brief (see Appendix "F").

Burke's testimony that he and Tharpe arrived that afternoon, while the sun was perhaps still out, gives credible weight, that Tharpe had seen a motorcycle parked near the back door of the lounge (Burke 4/943). Than perhaps the arrival of Burke and Tharpe was much earlier then testified to by Burke, since Tharpe had a blood alcohol

content of 0.2% as testified to by (Dr. Warren 4/993-94), that Tharpe was severely or highly intoxicated. It would appear that Tharpe would have to be drinking for a long period of time during that day and perhaps had arrived much earlier than testified to by Burke.

When Albert returned to the Hi-Lo Lounge shortly before 6:00 pm with Breaux, Pete, and Adams, Albert was then greeted by Aucoin, whereby Albert introduced Aucoin to Breaux (Albert 6/1293). Albert advised Aucoin where he had been and wanted to leave because he was getting tired (Aucoin 5/1129) (Albert 5/1241). Aucoin asked Albert to stay a little while because he had just arrived (Albert 6/1294). Albert ordered a beer, went to the juke box, turned and seen Tharpe and Burke seated at the end of the bar (Aucoin 5/1129) (Albert 5/1241). Albert turned to Aucoin and said, "let's get out of here" (Albert 5/1242) (Albert 6/1294). Upon departing through the rear door, Albert and Aucoin were approached by both Tharpe and Burke outside of the lounge near Albert's motorcycle that was still parked near the rear door of the lounge.

During the confrontation, Albert and Aucoin both seen one of the two men reach behind his back (Albert 5/1242) (Aucoin 5/1130). Albert than drew his weapon after seeing one of the two men pull a gun, and both Burke and Tharpe ran to the front of the lounge's parking area (Albert 5/1242-43) while Albert was drawing his weapon, a single shot was fired near Albert's motorcycle as the weapon was being cocked (Albert 5/1242) (Aucoin 5/1130). Perhaps Burke's testimony also reveals this shot since he testified there was a time period between the other shots (Burke 5/943).

While Albert was faced with a deadly situation and where retreat was not possible because of the layout of the

area, Albert proceeded to the front on the lounge's parking area seeking to secure his safety. When stepping out onto the front portion of the lounge's parking area, Tharpe jumped up from between two parked cars and fired a single shot in Albert's direction. The bullet was retrieved from an adjacent house next door and introduced into evidence at trial (SR 4/1354-59). Simultaneously, Albert's instinct was to jump to safety and when doing so, striking his hand against the front portion of the building, inadvertently causing his weapon to discharge in Tharpe's direction. The bullet striking Tharpe in his right armpit area as testified to by (Dr. Warren 4/991-92). These two shots were fired very close to one another as testified to by witnesses at trial.

At this point, Albert had to retrieve his weapon that had fallen to the ground (Aucoin 5/1132-33) (Albert 5/1244). Upon retrieving his weapon, Albert turned towards the front of the lounge, and when not seeing either Tharpe or Burke, ran towards the back outside portion of the building (Aucoin 5/1133) (Albert 5/1245). After seeing a car leave from the front of the lounge (Albert 5/1131) (Albert 5/1246) (see also Burke's police report filed into the 5th Circuit record at 00158).

When Albert entered the lounge through the rear door, this prevented a number of people from leaving the lounge through the rear door (see Debra Harman's affidavit filed into the record of the 5th Cir. at 00156) when Albert entered the lounge through the rear door. When Albert entered the lounge through the rear door, Albert seen Bruce Verdin with something in his hand, thought to be Verdin's gun, and pointed his weapon within inches of Verdin, seen that Verdin had the phone in his hand, told Verdin to put the phone down that everything was cool (Albert 5/1246-48). At this moment, Albert seen someone

run towards the men's restroom area. Albert then moved toward the men's restroom, noticing someone lying on the floor next to the ladies' restroom, thinking at first this person to be a drunk (Aucoin 5/1131) (Albert 5/1249), proceeded to enter the men's restroom. When Albert tried to open the door, someone on the other side slammed the door closed. Albert then kicked on the door and seen Burke through the crack in the door, fired a single shot through the crack in the door, fired a single shot through the portion of the door away from the person behind the door, the bullet striking Burke on his finger of his outstretched arms. Albert forced Burke to lie on the floor next to Tharpe whereby Albert strikes Burke with his weapon on the head and kicked him for trying to get up.

Albert wished to advise this Honorable Court that it was Burke that Albert hit, and not Tharpe as testified to by (Burke 4/945) (see also Burke's police report where he stated "the bullet made a cut above my left eye." This is when Albert hit Burke with his weapon, 5th Cir. record at 00158-59).

Upon seeing that Tharpe had been injured, Albert instructed the bartender, Verdin, to call for an ambulance and police (Verdin 4/875) (Aucoin 5/1131-32) (Albert 5/1251). A short time thereafter the ambulance along with the state police arrived at the scene.

The theory by which the state supported its case was to implant into the minds of the jury that Albert had a specific intent to kill or inflict great bodily harm upon more than one person. However, Albert was convicted of the lesser included offense of second degree murder.

The state solicited testimony from Sheila Martin, who upon the very first day of the trial, informed the

district attorney, that she overheard a conversation between Albert and Aucoin that afternoon. That Albert and Aucoin was talking about going to Audrey's Lounge in order to look for Tharpe and Burke.

During the trial of this matter, certain jury instructions were given that relieved the state of its constitutional burden of proving every element of the crime charge and the prosecutor's failure to disclose exculpatory evidence to defendant, depriving Albert of his constitutional right to due process of law.

ARGUMENT

1. The erroneous jury instruction regarding the presumption of specific intent constituted reversible error.

In charging the jurors on the issue of intent in this case, the trial judge stated as follows:

> "The law presumes that the defendant intended the natural and probable consequences of his act and that presumption stands until it is overcome by rebutting evidence. Although intent is a question of fact it need not be proved as a fact. It may be inferred from the circumstances of the transaction. No further proof of intent is required than the accused voluntarily, that is, knowingly did the act." (SR 7/1541-43, and 7/1561-62)

Louisiana Revised Statute 14:30.1 provided at the time of the alleged offense as follows:

> Second degree murder is the killing of a human being:
>
> (1) When the offender has a specific intent to kill

or to inflict great bodily harm; or

(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

Louisiana Revised Statute 14:10 provided as follows:

Criminal intent may be specific or general:

(1) Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act.

(2) General criminal intent is present whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act.

Albert was indicted and prosecuted for first degree murder. According to Louisiana's first degree murder statute, specific intent is the mandatory element. However, Albert's jury returned a responsive verdict, finding him guilty under Louisiana's second degree murder statute LSA-R.S. 14:30.1(1). Under subpart (1) of this statute, which is the only possible application since defendant was

not engaged in any of the crimes enumerated in subpart 2, the state clearly was obligated to prove beyond a reasonable doubt the element of specific intent.

The erroneous charge to the jury impermissibly shifted the burden of proof off the state and onto Albert, thus relieving the state of its constitutional responsibility of proving every essential element of a criminal offense beyond a reasonable doubt. See *Yates v. Evatt*, III S.Ct. 1884 (1991); *Sandstsrom v. Montana*, 442 U.S. 510 (1979).

In *Francis v. Franklin*, 471 U.S. 307 (1985), the *Franklin* court held that a *Sandstrom* instruction is not cured by additional words pertaining to presumptions being rebutted. Nor is it cured by earlier portions of a jury charge that explains a defendant is presumed innocent, and that the state is required to prove every element of the offense beyond a reasonable doubt. It is judicially reasoned that these additional words only add confusion to the minds of the jurors.

With the notable similarity between Albert's impermissible jury charge, the one in *Sandstrom* and like cases, Albert feels confident this Court realized his trial was infected by an unconstitutional burden-shifting instruction. The end result of this error was in essence the denial of Albert's right to "an impartial jury" trial pursuant to the Sixth Amendment of the United States Constitution, as applied to the State of Louisiana by the Fourteenth Amendment of the United States Constitution.

The Court of Appeals for the Fifth Circuit correctly cited the standard of review in such a case, referring to *Yates v. Evatt*, III S.Ct. 1884, which states in pertinent part as follows:

Before reaching such a judgment, a court must take two quite distinct steps. First, it must ask what evidence the jury actually considered in reaching its verdict. If, for example, the fact presumed is necessary to support the verdict, a reviewing court must ask what evidence the jury considered as tending to prove or disprove that fact. Did the jury look at only the predicate facts, or did it consider other evidence bearing on the fact subject to the presumption? In answering this question, a court does not conduct a subjective inquiry into the jurors' minds. The answer must come, instead, from analysis of the instructions given to the jurors and from application of that customary presumption that jurors follow instructions and, specifically, that they consider relevant evidence on a point in issue when they are told that they may do so.

Once a court has made the first inquiry into the evidence considered by the jury, it must then weigh the probative force of that evidence as against the probative force of the presumption standing alone. To satisfy *Chapman's* reasonable doubt standard, it will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue under *Chapman* is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption. Since that inquiry cannot be a subjective one into the jurors' minds, a court must approach it by asking whether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption. It is on-

> ly when the effect of the presumption is comparatively minimal to this degree that it can be said, in *Chapman's* words, that the presumption did not contribute to the verdict rendered. 111 S.Ct. at 1893-1894 (footnotes omitted).

Defendant submits, however, that the lower appellate court erred in its narrow examination of the trial record, apparently reviewing only that evidence tending to establish the predicate facts of the offense charged. See discussion in *Yates,* III S.Ct. at page 1894. Undersigned counsel would further suggest that the instant case should be subject to a "heightened scrutiny" or stricter standard of review of the harmless rule such as that recommended in *Satterwhite v. Texas,* 486 U.S. 249 (1988). While Albert was sentenced to capital punishment, a sentence of "life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence" is clearly a punishment of such severity so as to require an elevated standard of harmless error review.

Several factors at trial indicate the necessity for a review of the entire record herein.

During the jury's deliberation, the jury requested further instructions. Listed first among the list was not guilty. It would be very hard to conclude otherwise that the jury was not affected by this erroneous jury instruction as to Albert's intent, since the jury's request seemed to be centered mostly with the least of responsive verdicts, listing them in reverse order (SR 7/1552).

During Albert's trial a number of state witnesses were called and testified that Albert entered the lounge through the front door on the heels of Tharpe after the shooting. The state relied heavily on the theory that Albert was the aggressor in the conflict in order to convict. A con-

cise order of this theory appears by the following testimony of state witnesses: (Verdin 4/868, 923, 924); (Leblanc 5/1021-23); (Williams 5/1033, 1035, 1040, 1042); (Folse 5/1056, 1057, 1070). Also during trial, while defense counsel questioned Burke as to Albert coming in the lounge through the back door, the district attorney seems to guide his witness in saying Albert did not come through the back door (SR 4/957). The state further seems to rely on the theory of Albert being the aggressor when the jury charge was re-read to the jury (SR 7/1554). The trial judge also indicates that perhaps Albert was the aggressor.

The fact that defendant presented significant evidence to contradict the state's allegation that he was the aggressor obviates the necessity that the entire record be reviewed in light of the erroneous jury instruction.

When Burke testified at trial, he changed his mind and gave false testimony that Albert did not enter through the back door, but only saw Albert at the back door, whereupon Burke runs to the men's restroom and holds the door shut with his outstretched hands. (Burke 4/944-45). It becomes obviously clear that this change of heart by Burke was needed in order to blend with the other state witnesses, for if Burke would have testified as to his prior police report, which states: " . . . I saw Dale Albert walk in the back door . . .", his testimony would have contradicted with other state witnesses' testimony. Although the court of appeals stated that Albert waived his argument "that Burke's testimony was false", an examination of Albert's brief to the Fifth Circuit Court of Appeals clearly demonstrates otherwise.

A close examination of the testimony of Sheila Martin indicates that a number of state witnesses were all together at different times leading up to trial and were

discussing what they all saw the night of the shooting (Martin 6/1449-53).

These facts coupled with the hidden exculpatory evidence as stated in the following claim II, brings this reasonable doubt as to Albert's intent to light, clearly demonstrating that the *Sandstrom* instruction was not "harmless" error.[1] Accordingly, based upon the standard of review set out in *Yates*, or in the alternative, under the heightened scrutiny standard of *Satterwhite* as suggested by undersigned counsel, this Honorable Court should reverse the unconstitutional conviction of defendant herein, or in the alternative, remand the matter to the state appellate courts for rehearing in light of this jurisprudence.

2. The prosecution violated the *Brady* rule by failing to produce favorable evidence to defendant.

The *Brady* rule is well established, in "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 1196-97 (1963).

The Federal District Court erred when assessing the facts as to Albert's claim. The specific exculpatory

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[1] In *Boyde v. California*, 494 U.S. 370 (1990), this Court sets out to clarify the standard for an ambiguous instruction that may be susceptible to a meaning that would render it unconstitutional. 494 U.S. at 370. In "ambiguous instruction" cases, the test is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Estelle v. McGuire*, 112 S.Ct. 475, 482 (1991) (quoting *Boyde*, 494 U.S. at 380). Petitioner does not contend that this instruction was ambiguous; however, if it is, there is a reasonable likelihood that the jury chose the unconstitutional meaning.

evidence Albert points to is the proposed testimony of a state witness, Debra Harman. Albert refers to the opinion as stated at page -10- of the District Judge's order denying Albert's petition for a writ of habeas corpus (5th Cir. record at 00059) which states:

> . . .However, petitioner was furnished an affidavit from the uncalled witness.

During the trial of this matter, certain witnesses were subpoenaed by the state, the state informed the jury that certain witnesses would testify. Further there would have been no logical reason for the state to subpoena Debra Harman unless she had in fact given an oral or written statement to the police the night of the shooting or was also called to testify before the grand jury in these proceedings.

Albert was never informed of this statement Harman turned over to the police the night of the shooting. It wasn't until investigative work on behalf of Albert, while still in jail after trial, that this information came to be known by Albert. The suspicious nature of these facts came to light only after trial, and during the Motion For New Trial, on August 15, 1980, when the trial judge denied the Motion, over defense objection, for an in-camera inspection of the state's files (see MNT 7/1630-32).

During the course of trial, defense attorney tried to obtain statements from the state witnesses that were slated to be called by the state. However, because of the trial judge's ruling, the defense was unable to pursue other state witnesses in order to obtain statements that perhaps could have been helpful to the defense. Defense counsel was relegated to attempting to obtain statements during cross-examination from each state witness that was being called to testify, as to any prior statements that the state may

have had in its files after each witness had testified on direct. The state had never called Debra Harman and two other witnesses during trial.

Albert did not give up his quest for this exculpatory evidence and was furnished an affidavit by Debra Harman on February 28, 1984, in order to have some basis to present this claim in a post-conviction petition for habeas corpus. (See affidavit of Debra Harman filed into the 5th Cir. record at 00156). This affidavit indicates that the affiant had stated to the prosecution before trial that defendant did not enter through the front door in hot pursuit of the alleged victim.

During an evidentiary hearing in the state court held January 9 and 10, 1985, the testimony by Debra Harman was not allowed over defense objections (EHT 2/626-32).

Albert claims that if this information would have been available to him prior to trial, that this testimony would have aided Albert in negating the state's theory and given rise to reasonable doubt as to Albert being the aggressor.

The state's failure to provide Albert with this *Brady* material clearly constitutes reversible error, as well.

Respectfully submitted:

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APPENDIX A

SUPREME COURT OF LOUISIANA

NO. 81-KA-0279

STATE OF LOUISIANA

VERSUS

DALE RALPH ALBERT

FILED
MAY 17 1982

APPEAL FROM THE THIRTY-SECOND
JUDICIAL DISTRICT COURT,
PARISH OF TERREBONNE,
HONORABLE ASHBY W. PETTIGREW, JR., JUDGE.

DENNIS, Justice*

Defendant, Dale Ralph Albert, Jr., was charged by a Terrebonne Parish grand jury with first degree murder, La. R.S. 14:30. On July 1, 1980, he was convicted by a twelve-person jury which found him guilty of the lesser included offense of second degree murder. He was sentenced to serve life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. Defendant now appeals on the basis of sixteen arguments.

At approximately six o'clock p.m. Friday, December 21, 1979, a shooting occurred at the Hi-Lo Lounge located on Highway 20 in Terrebonne Parish. As a result of the

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* Judges Melvin A. Shortess, Burrell J. Carter and Felix H. Savoie, Jr. of the Court of Appeal, First Circuit, participated in this decision as Associate Justices pro tempore, joined by Associate Justices Dennis, Blanche, Watson and Lemmon.

shooting, Tommy Tharpe, age 26, died, and Thomas Burke, age 27, was injured losing a portion of his middle and ring finger of his right hand.

Tharpe and Burke stopped at the lounge after work on December 21, 1979. Burke went directly into the lounge while Tharpe, the deceased, went around the side of the building to see a motorcycle parked there. Two shots were heard by Burke, other patrons, and the employees of the lounge. Tharpe entered the lounge holding his chest and fell to the floor. The defendant, Dale Albert, entered the lounge a revolver. Burke ran to the men's room and held the door shut with his body. Other patrons of the lounge and employees sought cover as well. Albert kicked at the men's room door trying to open it. During his second attempt to open the door, the defendant fired a shot through the door striking Burke in his right hand. Burke left the men's room complaining that his finger had been shot off. The defendant forced Burke to lie on the floor next to the mortally wounded Tharpe. During this time, Bruce Verdin, the manager of the lounge, attempted to phone the police twice, but the defendant pointed the weapon at him prompting Verdin to put the phone down on both occasions. An employee of the lounge, Sheila Martin, escaped from the building and phoned the police from a nearby grocery store. The defendant was arrested at the scene.

Only three of the defendant's specifications of error present legal issues of some novelty:

SPECIFICATION OF ERROR II
(Assignment No. 9)

By this assignment defendant argues that the trial court committed reversible error by its failure to sustain a challenge for cause. After examining Mr. White, a prospec-

tive juror, the defense counsel challenged him for cause on the basis of his statements which indicated that he might be influenced by the fact that his brother had been killed during the commission of a crime thirteen years before and that he would automatically vote to recommend the death penalty in the event of conviction. This was sufficient for a prima facie showing under La. C.Cr.P. art. 797 (2) and (4) which requires the trial court to sustain a challenge for cause when the juror is not impartial, whatever the cause of his partiality or when the juror will not accept the law as given to him by the court. The defendant need only show two things to obtain reversible error: (1) that the trial judge erred in refusing to sustain a challenge for cause by the defendant, and (2) that the defendant exhausted all of his peremptory challenges, as he did in this case. *E.g., State v. Monroe,* 366 So.2d 1345 (La. 1978). Before the court ruled on the challenge, however, Mr. White was examined by the assistant district attorney and stated that he would apply the law as given to him by the court; that he would follow what the judge told him even if there were a conviction; and that he would follow the guidelines included in the judge's instructions in determining a sentence. The defense counsel did not examine Mr. White further.

Although a trial court should sustain a challenge for cause despite a prospective juror's professed impartiality if his answers reveal facts from which bias, prejudice or inability to follow the law may be reasonably implied cf. *State v. Lewis,* 391 So.2d 1156 (La. 1980); *State v. Monroe, supra,* we do not think the trial judge erred in finding that any such implication was dispelled in Mr. White's case by his total performance during his examination. Mr. White, a retired schoolteacher who had taught in the parish for twenty-one years was very candid and conscientious throughout his examination, revealing that he had once or twice consulted the district attorney on a minor civil

business matter and that he was related by marriage to another prospective juror who was excused by consent of both sides. After carefully examining Mr. White's testimony, we cannot say the trial judge was wrong in believing that he could be impartial and would follow the law despite his initial answers which caused the alert defense counsel to challenge him for cause.

This specification is without merit.

SPECIFICATION NO. VII
(Assignment No. 31)

Defense counsel argues that the trial judge erred in sustaining the prosecutor's objection to a question put to Mr. Verdin, a state's witness, on cross-examination: "Q. Mr. Verdin isn't it true that you would like to see Mr. Albert convicted of this charge?" He contends he should have been allowed to ask the question in order to show bias.

La. R.S. 15:492 provides:

> "When the purpose is to show that in the special case on trial the witness is biased, has an interest, or has been corrupted, it is competent to question him as to any particular fact showing or tending to show such bias, interest or corruption, and unless he distinctly admit such fact, any other witness may be examined to establish the same."

This statute recognizes the generally accepted proposition that partiality, or any acts, relationships or motives reasonably likely to product it, may be proved to impeach credibility; and that there are an infinite variety of the kinds and sources of partiality. See McCormick, Evidence, § 40 (2d ed. 1972). However, La. R.S. 15:492, also seems to adopt the view of many courts that when the main cir-

cumstances from which the bias proceeds have been proven, the trial judge has discretion to determine how far the details, whether on cross examination or by other witnesses, may be allowed to be brought out. See McCormick, Id. at n. 21 and cases cited.

Before the question at issue was asked, Mr. Verdin had testified fully to facts indicating that he was certain the defendant had committed a brutal murder. He recounted that, after he heard gunshots outside, the defendant, with a revolver in his hand, followed the staggering victim inside, kicked him and banged his head on the floor after he collapsed, and ordered Mr. Verdin at gunpoint to desist in his efforts to call an ambulance as the victim bled profusely on the floor. If Mr. Verdin's certainty that the defendant had committed outrageous criminal acts can be called bias or partiality, the main circumstances from which it proceeded were well proven. We cannot say the trial judge denied the defense a reasonable opportunity to prove the bias of the witness or misused his discretion in determining how far the details would be allowed to be brought out.

This specification is without merit.

SPECIFICATION OF ERROR NO. XI
(Assignments Nos. 21-23)

By this specification the defendant argues that the trial court erred in refusing him the right to use the written statements of state witnesses, Bruce Verdin and Sheila Martin, to impeach their testimony at trial.

We frankly do not understand appellate defense counsel's complaint with regard to the Bruce Verdin statements. The trial trnscript at pages 889, et seq., in-

dicates that defendant's trial counsel wished to show that on several occasions before trial Verdin had said that the defendant had fired more than one shot into the bathroom at Burke, rather than a single shot as he had testified on direct examination. The transcript at pages 899-900 further shows that defense counsel was given a copy of one such statement and used it to refresh the witness's memory. Moreover, the record at 901-904 reflects that in response to defense counsel's further cross-examination, Verdin distinctly admitted that on three occasions before trial he had stated, contrary to his trial testimony, that the defendant had fired more than one shot into the bathroom. The evidence that a witness made a prior inconsistent statement is not admissible until he fails to distinctly admit making such a statement after a proper foundation for impeachment has been laid. La. R.S. 15:493. Defendant's trial counsel obtained everything from the witness to which his client was entitled by law in the way of impeachment—distinct admissions to prior inconsistent statements. Unless we have misread the argument, this assignment is totally without merit.

Before trial, the defendant's attorney interviewed prosecution witness Sheila Martin pursuant to the trial court's order that she be made available for this purpose. During the trial, however, the court ruled that defense counsel could not use any statement he elicited from her in the pretrial conversation because she had been under the mistaken impression that the court had ordered her to give him a statement in addition to merely listening to his questions. The defense counsel objected to the trial judge's ruling, and after completing his cross examination of Mrs. Martin, he renewed his objection and made a proffer of his handwritten notes of the interview to show the importance of her statements and the prejudicial effect of the judge's ruling. Defendant's appellate counsel assigns as error the

trial court's refusal to allow the statements to be used for impeachment.

Although the trial judge's ruling was questionable, we need not resolve the basic question presented by his suppression order. We have reviewed the trial defense counsel's proffered notes and find that Mrs. Martin testified at trial consistently with virtually all of the information contained in them. The lawyer's notes indicated she made one prior inconsistent statement: Before trial she said she had heard of the victim Tharp before the shooting and thought he was the type of person she would be afraid of. At trial she testified she did not remember whether she had heard of Tharp before the shooting. In the context of this case, however, we do not think the defendant's inability to use the statement as impeachment material could have possibly contributed to the conviction. Her statement was brief and totalling lacking in any specifics as to why Tharp had a bad reputation. The defendant took the stand and give extensive detailed testimony as to Tharp's violent nature and bad character.

The remaining specifications of error have no merit and raise no new issues of law. For the benefit of the parties, we will discuss them in an unpublished appendix to this opinion. Because none of the specifications of error discussed above or in the appendix have merit, we affirm the conviction and sentence of defendant.

AFFIRMED.

APPENDIX

(Not for publication)

SPECIFICATION OF ERROR I
(Assignments Nos. 6, 12, 13, 14, 15, 16, 17 and 19)

Defendant argues in these assignments that the trial court erred in granting the state's challenges for cause of eight prospective jurors for their conscientious scruples against the infliction of capital punishmnent. This specification of error lacks merit. La. C.Cr.P. art. 798; *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *State v. Berry,* 391 So.2d 406 (La. 1980); *State v. Williams,* 392 So.2d 619 (La. 1980); *State v. Lee,* 340 So.2d 180 (La. 1976).

SPECIFICATION OF ERROR III
(Assignment No. 11)

The defendant argues that the trial court erred in denying his challenge for cause of prospective juror Dorothy C. Matherne. Ms. Matherne indicated that the murder had been a topic of conversation between herself and others some six months prior to the trial. She also indicated that she had drawn a conclusion as to the defendant's guilt, because of the belief she had at the time, that he had confessed to the murder. In reply to questioning by the judge, the prospective juror asserted that she could be fair and impartial and that she could apply the law to the facts of the case without regard to her prior understanding or misunderstanding of the case. The judge denied defendant's challenge for cause. The defense subsequently utilized a peremptory challenge to remove Ms. Matherne from the panel of prospective jurors. An examination of Ms.

Matherne's entire voir dire examination reveals that she was able to "lay aside [her] impressions or opinions and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). While a prospective juror's statement that he will be fair and impartial is not binding on the trial court, we are unable to find that bias or prejudice may reasonably be implied in this situation. See La. C.Cr.P. art. 797(2); *State v. Lewis*, 391 So.2d 1156 (La. 1980). Accordingly, this specification of error is without merit.

SPECIFICATION OF ERROR NO. IV
(Assignment No. 18)

Defendant argues that the trial court erred in denying the defense challenge for cause based on the hearing defect of a prospective juror. The prospective juror Mr. William Andrews admitted to having a hearing defect corrected by a hearing aid. Mr. Andrews assured the court that he could hear the judge, the two counsel, and the witnesses if they spoke clearly. The judge commented that he had observed Mr. Andrews talking and responding to questions asked at an ordinary tone level. The judge felt that Mr. Andrews's impediment was not such that it would render him incapable of acting on the jury and voting a fair and impartial verdict.

The state notes in its brief that La. C.Cr.P. art. 401 governs the qualifications of jurors. In regard to physical impairments, this court specifically addressed a hearing defect in *State v. Vassel*, 285 So.2d 221 (La. 1973). The trial judge in *Vassel* stated that he had been acquainted with the prospective juror and had watched his responses during voir dire such that he felt the prospective juror's hearing problem was not apparent enough to affect his service as a juror to any degree. This court found no error in the

ruling of the trial judge.

The instant case is analogous to *Vassel, supra*, since the trial judge similarily observed the prospective juror. Based on the facts of the voir dire and Louisiana jurisprudence there is no basis for the defendant's argument herein.

This assignment lacks merit.

SPECIFICATION OF ERROR NO. V
(Assignments Nos. 42, 43, 44, 45, 46 and 47)

Defendant argues that the trial court erred by allowing various state exhibits into evidence. The following exhibits, it is argued, were allowed into evidence without a proper foundation being laid: state exhibit No. 17 (a door), No. 38 (bullets), Nos. 20 and 21 (photographs of the victim), and No. 23 (a projectile). Number 30, a photocopy of a lab report, was not the original and, therefore, not the "best" evidence.

To admit demonstrative evidence at trial, the law requires that the object be identified either visually or by chain of custody. *State v. Overton*, 337 So.2d 1201 (La. 1976). State exhibit No. 17, the restroom door, was identified by Mr. Verdin who, as manager of the Hi-Lo Lounge, was qualified to do so. State exhibit No. 28, the bullets from the weapon, and No. 23, the projectile, were identified by Detective Red Walling as custodian of evidence for the Crime Lab of Terrebonne Parish Sheriff's Office. Det. Walling received the projectile as soon as the coroner removed it from the body. When the gun was found in the mud by two boys, it was Det. Walling who received it. He not only identified the gun in court but the shells that were removed

from it.

State exhibits Nos. 20 and 21, photographs of Thomas Tharpe, were identified by Dr. Sidney Warren who performed the autopsy on Tharpe and was present when the photographs of his body were taken. In order for photographs to be introduced into evidence, they had to be identified as accurate representations of the subject in question and shed light on the matter before the court. *State v. Otis,* 339 So.2d 343 (La. 1976). Dr. Warren testified that the photos were an accurate depiction of the pictures that were taken at the autopsy. The photographs depicted the entrance wounds which corroborated testimony that the victim was shot. Thus, a proper foundation was laid for their introduction into evidence.

State exhibit No. 30, a photocopy of the laboratory report, was a certified true copy that met the requirements of La. R.S. 15:499 as a certificate of analysis. The certificate can be introduced into evidence pursuant to La. R.S. 15:500. The defendant has the option to summon those making the original of the certificate as witnesses under cross-examination. Only in such cases will the certificate not be prima facie proof of its contents or of proper custody.

A review of the record reveals that each exhibit was introduced properly according to the law and the defendant's objections are groundless.

These assignments lack merit.

SPECIFICATION OF ERROR NO. VI
(Assignments Nos. 26, 27, 28, 29
30, 39, 70, 71 and 88)

The defendant argues that the trial court erred in denying a defense motion, after the direct examination by the prosecution of Bruce Verdin, Tony LeBlanc, Debbie Folse, Sheila Martin, Dena Aucoin, and Mark Larose, for the production of the grand jury testimony by each witness or any written or oral statements made by these prosecution witnesses. Defendant also claims that the trial court erred in denying his motion for an in camera inspection of the state's files in connection with the defense motion for a new trial.

This court has consistently held that a defendant is not entitled to production of a transcript of the secret grand jury proceedings against him. La. C.Cr.P. art. 434; *State v. Prestridge*, 399 So.2d 564 (La. 1981); *State v. Sheppard*, 350 So.2d 615 (La. 1977); *State v. Williams*, 310 So.2d 528 (La. 1975).

Defendant has failed to demonstrate a particular need for the grand jury testimony. Under these circumstances, the trial judge ought not to be burdened with the task of examining voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony. *State v. Martin*, 376 So.2d 300 (La. 1979).

The defendant's general request for exculpatory material that might be in the state's files does not mandate an in camera inspection of those files by the trial court. Cf. *State v. May*, 339 So.2d 764 (La. 1976).

This specification lacks merit.

SPECIFICATION OF ERROR NO. VIII
(Assignment No. 74)

Defendant objects to the trial court's imposition of

life imprisonment wiothout benefit of parole, probatiion, or suspension as being excessive, cruel and unusual and not individualized as required by *State v. Sepulvado*, 359 So.2d 143 (La. 1979).

As the state argues, the life sentence for second degree murder is mandated by the legislature. This court has consistently rejected arguments attacking the constitutionality of the mandatory sentencing provisions of La. R.S. 14:30.1; *State v. Daniel*, 378 So.2d 1361 (La. 1979); *State v. Brooks*, 350 So.2d 1174 (La. 1977]; *State v. Cook*, 345 So.2d 29 (La. 1977). Cf. *State v. Prestridge*, 399 So.2d 564, 582 (La. 1981).

SPECIFICATION OF ERROR NO. IX
(Assignment No. 50)

Defendant argues that the trial court erred by denying the defense motion for a mistrial based on the state's question to the defendant, "Have you ever been arrested?"

A review of the transcript discloses that defense counsel interrupted the prosecutor's question. As the prosecutor explained to the judge, he was going to ask, "Have you ever been arrested and convicted within the last ten years?" The judge admonished the prosecutor for mentioning arrest since under La. R.S. 15:495 only evidence of a conviction is admissible. The judge denied defendant's motion for a mistrial since the question was interrupted so quickly and defendant had no chance to respond; thus, defendant's case was not prejudiced. The judge instructed the jury to disregard the question by the prosecutor and required him to rephrase the question such that it dealt with convictions only.

Based on the above facts of the instant case, defend-

ant suffered no prejudice from the remarks, and the trial court's denial of a mistrial was clearly not an abuse of discretion.

This assignment lacks merit.

SPECIFICATION OF ERROR NO. X
(Assignments Nos. 25, 32, 33, 54, 57, 60, 61, 62, 64 and 65)

Defendant argues that the trial court erred in allowing the state to ask repeat questions and to go beyond the scope of the case on direct, cross, redirect, and rebuttal examination.

The manner in which the examinations are conducted is largely within the discretion of the trial judge and his decisions will not be overruled in the absence of a clear abuse of that discretion resulting in prejudice two the accused. *State v. Murray,* 375 So.2d 80 (La. 1979). The defendant herein has not shown that the trial judge abused his discretion, nor does a reading of the transcript indicate defendant suffered prejudice as a result of the elicited testimony.

These assignments lack merit.

SPECIFICATION OF ERROR NO. XII
(Assignments Nos. 24, 75, 76, 77, 78, 79, 80, 81, 82, 83, 85 and 87)

Defendant contends that the trial court erred in denying jury charges submnitted by the defendant and in using a jury charge that has been declared unconstitutional by the United States Supreme Court in *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

However, there is no contemporaneous objection recorded in the transcript, although counsel claims in brief that he objected in chambers when discussing the jury charge with the trial judge. In *State v. Tyler,* 342 So.2d 574 (La. 1977), this court made clear that the failure of the defense to object to the prohibited *Sandstrom* charge barred the complaint on appeal. *Tyler* also suggested that the defendant might then look to habeas corpus relief or a claim of ineffective assistance of counsel. *Id.*, cf. *State v. Marcell,* 320 So.2d 195 (La. 1975). In this case, counsel may well need an evidentiary hearing in any event to reconstruct the conference held in chambers. On the present record, however, the defense appears to have waived the complaint. See La. C.Cr.P. art. 841.

SPECIFICATION OF ERROR NO. XIII
(Assignment Nos. 20 and 73)

Defendant argues that the trial court erred in denying defendant's motion for a mistrial based upon alleged violations of defendant's right to due process in jury selection. Jurors were excused from duty with reasons that defendant alleges may not be proper, thus, excluding identifiable segments of the local community and denying defendant his right to a fair and impartial jury.

La. C.Cr.P. art. 783 authorizes the court to excuse a member of the petit jury venire at any time prior to the time he is sworn as a juror to try a particular case if the jury service would result in "undue hardship or extreme inconvenience." The trial judge has broad discretion in excusing prospective jurors for undue hardship. *State v. Ivy,* 307 So.2d 587 (La. 1975). The defendant in the instant case did not prove any abuse of that descretion nor any systematic discrimination affecting a class of persons in the selection of the jury panel. Cf. *State v. Cass,* 356 So.2d

936 (La. 1978). The record reflects that the trial judge used sound discretion in excusing the jurors that he did excuse.

SPECIFICATION OF ERROR NO. XIV
(Assignment No. 51)

Defendant contends that the trial court erred by refusing to allow the testimony of Deputy Carl Kimble regarding the reputation of the victim. Deputy Kimble worked for the Terrebonne Sheriff's Office. He testified that he knew of the victim's bad reputation from other police officers and the owners and employees of a local lounge. The state objected to this testimony on the ground that Deputy Kimble was not qualified to testify as to the victim's reputation since his sources of information were fellow police officers and the owners and employees of a lounge in Houma, Louisiana. The judge sustained the objection. We agree with the trial court's conclusion that the requirements of La. R.S. 15:479 were not met. See *State v. Clark,* 402 So.2d 684 (La. 1981).

This assignment of error is without merit.

SPECIFICATION OF ERROR NO. XV
(Assignments Nos. 34, 37, 41)

Defendant alleges that the trial court erred by allowing evidence to be presented twice to the jury, first by the asking of questions regarding the evidence and second, by the actual introduction of the evidence.

In order to introduce evidence, La. C.Cr.P. art. 773 requires that a proper foundation be laid, although counsel has the freedom to decide the order in which the evidence is introduced.

Therefore, defendant's complaint that questions were asked about the exhibits before they were introduced is groundless since the initial questions were laying a foundation, as required by law, for the introduction of the exhibits into evidence.

These assignments lack merit.

SPECIFICATION OF ERROR NO. XVI
(Assignments Nos. 2, 3, and 4)

Defendant argues that the trial court erred in denying his motion for a continuance made when the state notified defendant, just prior to trial, that it intended to use inculpatory statements made by defendant to Det. Mark Larose, Sheila Martin and Bruce Verdin. Under La. C.Cr.P. art. 768, the state is only required to provide notice of intent to introduce an inculpatory statement in writing prior to the state's opening statement. In the instant case the state provided notice on June 23, 1980, the day before trial.

These assignments are without merit.

SPECIFICATION OF ERROR NO. XVII
(Assignments Nos. 55, 56, 58 and 59)

Defendant argues that the trial court erred in allowing specific testimony by certain witnesses. Specifically, defendant argues in his brief that the testimony of Bruce Verdin regarding what someone else said, during the events in the lounge, was hearsay testimony. On redirect examination by the prosecutor, the state asked Mr. Verdin "What did that party say?" He answered, "The party had told him [defendant] that he got the right one the first time and that, uh . . . ." At this time, defendant objected and the

jury was removed for argument by counsel. The judge ruled that the state could ask if a remark was made that caught defendant's attention, but it could not elicit the substance of that remark. Since the jury had already heard the remark, the judge admonished them to disregard it instead of declaring a mistrial. The state maintained that the substance of the remark could come in as evidence under res gestae.

The court excluded the evidence on grounds that the prosecutor's inquiry exceeded the proper scope of rebuttal. The jury had, of course, already heard the answer before counsel could interrupt and object. Nevertheless, an admonition to the jury appeared sufficient to cure any prejudice to the defendant. La. C.Cr.P. art. 771.

These assignments lack merit.

SUPREME COURT OF LOUISIANA

NO. 81-KA-0279

STATE OF LOUISIANA

VERSUS

DALE RALPH ALBERT

SHORTESS, JUSTICE AD HOC, dissenting

I respectfully dissent.

The prospective juror Royal White stated on voir dire that he would automatically impose the death penalty if the defendant was convicted of first degree murder. White revealed that his brother had been killed some twelve to thirteen years earlier, during the commission of a crime, and he felt justice had not been done because the murderer was convicted of a lesser included offense and received a light sentence. No amount of subsequent instruction or inquiry, in my opinion, could rehabilitate Royal White. He should have been discharged for cause. *State v. Lewis,* 391 So.2d 1156 (La.1980).

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DALE R. ALBERT, JR.	CIVIL ACTION
versus	NUMBER 90-3072
JOHN P. WHITLEY, WARDEN	SECTION "K" (3)

FILED
MAY 3 11:22 AM '91

ORDER AND REASONS

This matter was referred to the United States Magistrate Judge for the purpose of conducting a hearing, including an evidentiary hearing, if necessary, and submission of proposed findings and recommendations for disposition pursuant to 28 U.S.C. §636(b)(1)(B) and (C) and, as applicable, Rule 8(b) of the Rules Governing Section 2254 Cases.

Upon review of the entire record, the Court has determined that a federal evidentiary hearing is not necessary and the petition should be dismissed for the following reasons. Accordingly, the order of reference is hereby REVOKED.

Dale R. Albert, Jr. is a state prisoner presently incarcerated at the Louisiana State Penitentiary, Angola, Louisiana. He was convicted on July 1, 1980, of second degree murder, after trial by jury in the Thirty-Second Judicial District Court, Parish of Terrebonne, Louisiana.

DATE OF ENTRY MAY 6 1991

His conviction and sentence were affirmed on appeal. *State v. Albert*, 414 So.2d 680 (La. 1982).

In his *pro se* application for habeas corpus relief pursuant to 28 U.S.C. §2254, petitioner alleges the following violations of his constitutional rights:

> Ground one: As a result of the trial court's burden-shifting charge to the jury, petitioner's trial was fundamentally unfair in violation of petitioner's right to due process of law under the U.S. Constitution.
>
> Ground two: Conviction obtained by the unconstitutional failure of prosecution to disclose to the defendant evidence favorable to the defendant.

These grounds were unsuccessfully presented on direct appeal and in post-conviction applications to the Louisiana courts. Respondent concedes that petitioner has exhausted available state court remedies.

The duplicate record of the Louisiana court, including the transcript of petitioner's trial, is before this Court. The state record is sufficient for the purpose of adjudication of petitioner's claim and a federal evidentiary hearing is not necessary. 28 U.S.C. §2254(b); *Townsesnd v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

We adopt the following factual findings of the Louisiana Supreme Court summarizing the events which led to petitioner's prosecution and conviction:

> At approximately six o'clock p.m. Friday, December 21, 1979, a shooting occurred at the Hi-Lo Lounge located on Highway 20 in Terrebonne

Parish. As a result of the shooting, Tommy Tharpe, age 26, died, and Thomas Burke, age 27, was injured losing a portion of his middle and ring finger of his right hand.

Tharpe and Burke stopped at the lounge after work on December 21, 1979. Burke went directly into the lounge while Tharpe, the deceased, went around the side of the building to see a motorcycle parked there. Two shots were heard by Burke, other patrons, and the employees of the lounge. Tharpe entered the lounge holding his chest and fell to the floor. The defendant, Dale Albert, entered the lounge holding a revolver. Burke ran to the men's room and held the door shut with his body. Other patrons of the lounge and employees sought cover as well. Albert kicked at the men's room door trying to open it. During his second attempt to open the door, the defendant fired a shot through the door striking Burke in his right hand. Burke left the men's room complaining that his finger had been shot off. The defendant forced Burke to lie on the floor next to the mortally wounded Tharpe. During this time, Bruce Verdin, the manager of the lounge, attempted to phone the police twice, but the defendant pointed the weapon at him prompting Verdin to put the phone down on both occasions. An employee of the lounge, Sheila Martin, escaped from the building and phoned the police from a nearby grocery store. The defendant was arrested at the scene.

Albert, 414 So.2d at 681-82.

SANDSTROM ISSUE

Petitioner complains that the trial judge included in

his charge to the jury an impermissible burden-shifiting charge on intent which petitioner argues is prohibited by *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

The instruction at issue appears at several places in the instructions. In discussing the elements of first and second degree murder, the court stated:

> Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender desired the prescribed criminal consequences to follow his act or failure to act.
>
> That closes the quotation. The law presumes that the defendant intended the natural and probable consequences of his act and that presumption stands until it is overcome by rebutting evidence.

(State Record, Vol. VII, pp. 1541-43).

Under *Sandstrom*, the foregoing instruction impermissibly shifted the burden regarding petitioner's intent.

Respondent contends that we are precluded from considering the merits of petitioner's *Sandstrom* issue since petitioner failed to make a contemporaneous objection to the trial court's charge to the jury.

For a trial error to be reviewable in Louisiana, an objection must be made at the time of its occurrence. La. Code Crim. Proc., Ann art. 841 (West 1984). Absent cause for the procedural fault and actual prejudice from the error, principles of comity and federalism prevent federal courts from granting habeas corpus relief to a state petitioner whose claim would not be reviewable in the state court because of the default. *See Engle v. Isaac,*, 456 U.S. 107,

102 S. Ct. 1558, 71 L.Ed.2d 783 (1982).

The state record reflects that petitioner raised the *Sandstrom* issue in his direct appeal claiming that, although no objection to the charge appears in the record, petitioner's counsel did in fact object to the instruction during an unrecorded charge conference. The record further reflects that the attorney had made a request at the beginning of trial that all proceedings in the case be recorded. Additionally, the attorney believed that due to comments made by the trial judge, his objection made during the charge conference would be made part of the record.

The Louisiana Supreme Court refused to consider the issue on appeal on the basis of procedural default; however, it suggested that petitioner could present the issue in post-conviction proceedings where an evidentiary hearing would be available to determine whether his claim of a "*de facto*" objection could be considered a "*de jure*" objection.

Petitioner subsequently presented this issue again to the state court in a post-conviction proceeding whereupon an evidentiary hearing was conducted. Petitioner's trial counsel testified at the hearing that during the charge conference he objected to the portion of the charge, which is set forth above in this opinion, and was advised by the court that his objection would be noted.[1] The

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[1] In corroboration of his testimony, the attorney offered his copy of the proposed jury charges where he had struck through the phrase, "...and that presumption stands until it is overcome by rebutting evidence." (State R., Vol.II, p. 601). The record reflects a proposed substitute charge submitted by petitioner's counsel containing the prohibited *Sandstrom* language, "the law presumes that the defendant intended the natural and probable consequences of his act." (State R., Vol.I, p. 126). While these facts might support a finding that petitioner's counsel was not objecting to all of the offensive portions of the charge, the state trial judge made no factual findings in this regard. Nor need we, because of the result we reach herein.

judge who presided over petitioner's trial also testified at the evidentiary hearing.[2] He vaguely recalled a discussion about the portion of his charge at issue herein. He stated the discussion was consistent with petitioner's attorney's testimony, with one exception. The judge did not believe he would have told counsel that any objections made during the charge conference would be made part of the record. To the contrary, it was his practice to warn counsel to make appropriate objections on the record when court was back in session.

The state court, in an opinion read into the record, found as a fact that the procedure followed was the one described by the trial judge in his testimony. The statement inferred that counsel understood, or should have understood, that any objections raised during the charge conference had to be placed on the record when court reconvened.[3] (State R., Vol.II, p. 668). A presumption of correctness is afforded factual findings of a state court when supported by the record. 28 U.S.C. §2254(d); *see Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) and *Tenell v. Maggio*, 693 F.2d 591 (5th Cir. 1982). We conclude that the implicit and inferred findings by the state court in this matter have support in the state record. The trial court determined that petitioner was precluded from raising the *Sandstrom* issue because of procedural default.

Petitioner sought a review of the lower court's decision by applying for supervisory writs to the Louisiana

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[2] The judge who presided over the post-conviction proceedings was not the same judge who presided over petitioner's trial.

[3] Federal courts must give appropriate deference to implicit findings of a state habeas corpus court on credibility decisions. *Armstead v. Maggio*, 720 F.2d 894, 896 (5th Cir. 1983).

Supreme Court. The Supreme Court denied petitioner's application for writs without assigning reasons.

As instructed by *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989), the last state court rendering a judgment must expressly state that its judgment rests on a state procedural bar in order for the procedural default to act as a bar to federal consideration of the merits of a habeas petitioner's claim. Although the Louisiana Supreme Court was silent as to its reasons for denying petitioner's application for writs, this fact would not prevent the procedural default rule from applying in this case.

> ...[W]here a state intermediate appellate court renders a decision, and the highest state court thereafter simply denies discretionary review, then it is the judgment of the intermediate appellate court which is reviewed in the United States Supreme Court on certiorari, and the writ of certiorari runs to the intermediate appellate court. Accordingly, the *Harris* court's reference to "the last state court rendering a judgment in the case" should be understood to refer to the state court whose judgment would be reviewed if direct review had been granted in the United States Supreme Court....

Goodwin v. Collins, 910 F.2d 185, 187 (5th Cir. 1990).

Petitioner's procedural default bars our consideration of the merits of his *Sandstrom* claim. Even if we could address the merits of his claim; however, petitioner would not be entitled to relief because any error in giving a prohibited *Sandstrom* charge was harmless beyond a reasonable doubt.

> Application of a "harmless error" analysis to a *Sandstrom* instruction, therefore, poses the question of whether, given the record evidence, the state's release from its constitutional burden could have contributed to the conviction. Phrased differently, a *Sandstrom* instruction can be deemed harmless if no rational juror could have concluded from the record evidence that the perpetrator of the crime lacked the requisite intent. *Healy v. Maggio,* 706 F.2d at 701-02; *U.S. v. Fricke,* 684 F.2d at 1129.

Garland v. Maggio, 717 F.2d 199, 203 (5th Cir. 1983).

Petitioner was charged with first degree murder but was convicted on the lesser included offense of second degree murder, which was defined, in relevant part, as:

> ...the killing of a human being . . . [w]hen the offender has a specific intent to kill or to inflict great bodily harm....

La. Rev. Stat. Ann. § 14:30.1(1) (West 1986).

The evidence is overwhelming as to petitioner's intent to kill or inflict great bodily harm on his victim. The evidence reflected that petitioner had a motive to harm or "get even" with Tharpe. He had been beaten up by Tharpe and others ten months earlier, and, more recently, just a few weeks before the killing, Tharpe had kicked petitioner's girl friend in the stomach. A few hours before the shooting, petitioner was overheard several times by a barmaid in the HI-LO Lounge that he wanted to go to another lounge to look for Tharpe.

After Tharpe was shot outside of the HI-LO Lounge, he stumbled inside and fell to the floor. Petitioner then

entered the bar and proceeded to beat Tharpe on the head with his revolver and kick him in the ribs. Petitioner prevented the proprietor of the lounge on two occasions from calling the police on the phone. Petitioner had pointed his weapon at the proprietor and threatened to shoot him if he did not put the phone down.

Petitioner in the meantime attempted to go after Tharpe's friend Burke, who upon seeing petitioner enter the lounge after the shooting, barricaded himself in the men's bathroom. Petitioner attempted to push and kick the bathroom door open but was unsuccessful. He then shot through the door, shooting off one of Burke's fingers. Burke came out of the bathroom and petitioner forced him to lie down next to Tharpe. As a result of a conversation with his girl friend, petitioner took no further action against Burke and told the proprietor that he could then call an ambulance.

Petitioner presented a claim of self-defense at trial. He testified that Tharpe and Burke were outside by the side of the lounge when Tharpe pulled a gun out of his pocket. Petitioner claimed he reached for his weapon, which accidentally discharged while he was taking it out of his jacket. According to petitioner, Tharpe ran to the front of the lounge and hid between two automobiles. Petitioner followed, and upon turning the corner of the lounge, Tharpe shot at him. Petitioner claims that he knocked against the building and his weapon accidentally discharged again. He testified that he ran around to the back of the lounge to see where Burke and Tharpe were and later entered the lounge to retrieve his motorcycle helmet. He stated that he saw Tharpe lying on the floor, but did not recognize him, believing him to be a drunk.

After the shooting, petitioner threw his weapon into

a canal in back of the lounge. The weapon was recovered several months later by two boys playing in the neighborhood; three expended shells in the weapon were found. The witnesses in the barroom testified that they heard only two shots fired outside of the bar before the wounded Tharpe stumbled inside the bar. The third shot occurred when petitioner fired into the bathroom.

No weapon was found on Tharpe, nor was any found after the police searched the parking area outside of the lounge.

When questioned by the police, petitioner denied shooting Tharpe, or knowing anything about it.

Considering the above evidence, we are convinced beyond a reasonable doubt that the erroneous *Sandstrom* instruction did not contribute to, or affect the verdict reached by petitioner's jury.

BRADY MATERIAL

Petitioner alleges that the prosecution suppressed favorable evidence by not revealing to him that a listed, but uncalled state witness would have testified that after the initial shooting, petitioner entered the lounge from the back (side) door, rather than from the front door, as other state witnesses had testified.[4] However, petitioner was

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[4] Petitioner, in a supporting memorandum filed herein, also raises a related, but distinct, claim that the prosecutor allowed false testimony to be given at trial by Burke. He alleges that Burke testified that petitioner entered through the front door, which is contrary to the statement he gave the police that he came through the back door. Petitioner's claim is frivolous for two reasons. First, Burke did not testify that petitioner entered through the front door. He stated that as he was bending over the fallen Tharpe, he saw petitioner standing by the back door. Burke immediately ran for the men's room and did not see or know

furnished an affidavit from the uncalled witness. The affidavit confirmed that she would so testify as indicated above, and that she had informed the police in her initial statement to them, that petitioner had entered through the back door. No other "exculpa-tory" information appears in the proffered affidavit.

In *Jones v. Butler,* 864 F.2d 348 (5th Cir. 1988), cert. denied, 490 U.S. 1075, 109 S.Ct. 2090, 104 L.Ed.2d 653 (1989), the court held:

> The suppression of evidence favorable to the accussed, material to either guilt or punishment, violates due process whether or not the prosecution acted in good faith. Evidence is material only if there is a reasonable probability that the verdict would have been different had the evidence been disclosed to the defendant, or, stated in another fashion, if the reviewing court's confidence in the outcome is undermined.

Jones, supra, at 354.

Petitioner argues that evidence showing that he entered the lounge through the back door discredits the prosecution's theory that he entered the front door "in hot pursuit" of the victim, thereby creating an inference that he intended to harm the victim. In reviewing the entire trial transcript, including opening statements and closing argument by the prosecutor, we were unable to find support for petitioner's contention that the prosecutor placed any

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Footnote continued.

through which door petitioner entered the lounge. Second, petitioner's attorney had a copy of Burke's statement to the police prior to Burke testifying and actually cross-examined Burke on other aspects of the statement.

great reliance on such an inference. Most of the actions by petitioner, upon which the jury could infer intent, occurred after petitioner re-entered th lounge.

We conclude that no rights of petitioner were violated in the prosecutor's failure to make available the foregoing information. But even if the evidence had been produced, it would not have affected the outcome of the trial.

This issue is without merit.

Having concluded that an evidentiary hearing is not necessary and that the grounds raised in support of petitioner's application are not meritorious,

It is ordered that the petition for writ of habeas corpus filed by Dale R. Albert, Jr. be DENIED.

New Orleans, Louisiana, this 3d day of May, 1991.

/s/ Illegible

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DALE R. ALBERT, JR. — CIVIL ACTION NO. 90-3072

versus — SECTION: "K"(3)

JOHN P. WHITLEY, WARDEN

FILED
MAY 3 11:22 AM '91

J U D G M E N T

The Court, having considered the petition, the record, the applicable law, and for the written reasons assigned,

IT IS ORDERED, ADJUDGED, AND DECREED that the petition of Dale R. Albert, Jr. is hereby DISMISSED WITH PREJUDICE.

New Orleans, Louisiana, this 3d day of May, 1991.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY May - 6 1991

APPENDIX C

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 91-3484
Summary Calendar

FILED
JUL 09 1992

DALE R. ALBERT, JR.,
Petitioner-Appellant,

VERSUS

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,
Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-90-3072-K)

Before JONES, DUHE', and WIENER, Circuit Judges.

PER CURIAM:[1]

Petitioner seeks habeas relief following affirmance of

[1] Local rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has detemined that this opinion should not be poublished.

his conviction of second degree murder. He previously filed a state habeas proceeing in which relief was denied. The district court also denied relief, and we affirm.

His primary claims are that the jury charge violated the rule of *Sandstrom v. Montana*, 442 U.S. 510 (1979), and that the state violated *Brady v. Maryland*, 373 U.S. 647 (1963). We must determine if Petitioner has shown a federal constitutional violation and prejudice. 28 U.S.C. § 2254(a); *Carter v. Lynaugh*, 826 F.2d 408, 409 (5th Cir.), *cert. denied*, 485 U.S. 938 (1987).

The federal district court found the *Sandstrom* claim procedurally barred because the state court found it so and there was no showing of cause for the default or prejudice from it. *Young v. Herring*, 938 F.2d 543, 546 (5th Cir. 1991) (en banc), *cert. denied*, 112 S.Ct. 1485 (1992). It appears, however, that the state holding is clearly erroneous. A prop contemporaneous objection was made. This was established in the hearing held by the state habeas court. The error, however, is harmless. "[A] *Sandstrom* instruction can be deemed harmless if no rational juror could have concluded from the record evidence that the perpetrator of the crime lacked the requisite intent." *Garland v. Maggio*, 717 F.2d 199, 203 (5th Cir. 1983). This is the standard applied by the district court. After the district court ruled, the Supreme Court announced a slightly different test in *Yates v. Evatt*, 111 S. Ct. 1884, 1893 (1991). There the Court held that "the significance of the presumption to reasonable jurors [must be] measured against the other evidence considered by those jurors independently of the presumption." *Id.* This in turn requires us to ask "what evidence the jury actually considered in reaching its verdict...." and then to "weigh the probative force of that evidence as against the probative force of the presumption standing alone." The evidence in this case fully complies

with both standards. The evidence and the presumption both lead to the same conclusion: Petitioner undoubtedly intended the natural and probable consequences of his acts.[2]

Petitioner next contends that the State withheld from him the prospective testimony of a witness the state did not call who would have allegedly testified that, after shots were fired outside, Petitioner entered the bar through the back door and not through the front door. He argues this evidence would confirm his story that he was not in pursuit of the victim who entered through the front door. This evidence is not, however, material. Petitioner's actions after he entered the bar are so inculpatory this evidence could have made no difference in the outcome. Even if material, the question of which door Petitioner entered through was put at issue by the witness Burke. There was no violation of *Brady*.

Petitioner does not pursue here the argument made in the district court that Burke's testimony was false. The issue is waived. *See Hobbs v. Blackburn*, 752 F.2d 1079, 1083 (5th Cir.), *cert. denied*, 474 U.S. 838 (1985). Petitioner also attempted to raise additional issues in three letters addressed to the Clerk of this court. They deal with his right, if any, to bring additional habeas actions in the future and are premature.

He has also filed a motion to indefinitely stay this appeal while he exhausts his remedies on unspecified *Brady* issues. We deny the motion. There is no showing that these unspecified issues have anything to do with this appeal.

Motion DENIED; judgment of the district court AFFIRMED.

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[2] The facts of this murder are fully and accurately recited in the opinion of the Louisiana Supreme Court on direct appeal. *State v. Albert*, 414 So. 2d 680 (La. 1982).

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-3484

Filed
AUG 11, 1992

DALE R. ALBERT, JR.,
Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,
Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING

(August 11, 1992)

Before JONES, DUHE' and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby *denied.*

ENTERED FOR THE COURT:

/s/ John M. Duhe', Jr.
United States Circuit Judge

APPENDIX E

SUPREME COURT OF THE UNITED STATES

NO.

A-343

Dale Albert,
Petitioner

v.

John P. Whitley, Warden

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including January 8th, 1993.

/s/ Antonin Scalia
Associate Justice of the Supreme Court of the United States

Dated this 29th
day of October, 1992.

APPENDIX F

SEAL

DEPARTMENT OF THE NAVY
U.S. NAVAL OBSERVATORY
34th AND MASSACHUSETTS AVE., NW
WASHINGTON, D.C. 20390

IN REPLY REFER TO
3162/3
Ser NA/ 1006
15 Nov 1984

TO WHOM IT MAY CONCERN:

The following information is provided for Thibodaux, Lafourche Parish, Louisiana:

21 December 1979	Central Standard Time
Sunset	5:08 p.m.
Moonset	7:50 p.m.

On 19 December 1979 at 2:24 a.m. Central Standard Time the Moon was exactly at its New Moon phase.

21 December 1984	Central Standard Time
Sunset	5:09 p.m.
Moonset	4:26 p.m.

On 22 December 1984 at 5:47 a.m. Central Standard Time the Moon will be exactly at its New Moon phase.

/s/ P. K. Seidelmann
P. K. SEIDELMANN
Director
Nautical Almanac Office

I certify that the above statement is the result of a true and accurate computation by the Nautical Almanac Office of the U.S. Naval Observatory.

H. P. Colomb, Jr.
H. P. COLOMB, JR.
Commander USN
Deputy Superintendent